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Br. of Turner, Burry & Herrick for P. C. (on mo.)

Filed Oct. 24, 1898.

No. 354

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

THE FARMERS' LOAN AND TRUST COMPANY,
Plaintiff in Error,
vs.
THE LAKE STREET ELEVATED RAILROAD COMPANY, THE AMERICAN TRUST AND SAVINGS BANK and THE NORTHERN TRUST COMPANY,
Defendants in Error.

Writ of Error to the Supreme Court of Illinois.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

HERBERT B. TURNER,
WILLIAM BURRY,
JOHN J. HERRICK,
SOLICITORS FOR PLAINTIFF IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The defendant in error, The Lake Street Elevated Railroad Company, and the American Trust and Savings Bank have presented to the court what appear to be three motions:

1. To dismiss the writ of error for want of jurisdiction.

2. To vacate the order of *supersedeas*.

3. To affirm because the writ of error is frivolous.

It appears, however, from the brief of counsel in support of the motions, that the motion to dismiss and the motion to discharge the *supersedeas* are in fact intended as one motion, based on the single ground that this court has no jurisdiction.

Counsel say:

"The defendant in error, the Lake Street Elevated Railroad Company, has submitted to this Honorable Court a motion to dismiss the writ of error and quash the supersedeas *upon the grounds that the court is without jurisdiction of this cause*, and also has joined in said motion a motion to affirm *in case the court should hold that it has jurisdiction.*" (Brief for Lake Street Company, p. 1.)

In their printed motion, the grounds on which the motion to affirm is based are thus stated by counsel (Pr. motion, pp. 1-2):

"If this court shall determine that it has jurisdiction of this cause, then the said defendant in error, the Lake Street Elevated Railroad Company, moves to affirm the said judgment of the Supreme Court of the State of Illinois, *for the reason that it is apparent that the questions left in the record for determination in this court are frivolous and that the appeal is taken for delay.*"

In connection with the printed motion, is given what purports to be a statement of facts. In the brief for the Lake Street Company, filed with the motion, is given a statement of the case, covering 16 pages, and in the additional brief, filed for the American Trust and Savings Bank, this statement is referred to as accurately stating all the facts. It is manifestly impossible to properly discuss this lengthy statement of the case, and the arguments of counsel based on it, by reason of the fact that counsel making the motion have not complied with the established practice of this court, which requires that the record, or so much thereof as may be necessary for the court to consider in passing on the motion, should be printed. Counsel discuss the facts so fully, and in some respects so inaccurately, that to fully answer their briefs would require repeated references to the record, no part of which has been printed.

I.

THE MOTIONS SHOULD BE DENIED ON THE GROUND THAT THE DEFENDANTS IN ERROR HAVE NOT PRINTED AND PRESENTED TO THE COURT WITH THE MOTIONS SUCH PARTS OF THE RECORD AS IT IS NECESSARY FOR THE COURT TO CONSIDER IN PASSING ON THE MOTIONS.

The rule of practice in this court which requires a party making a motion based on the record, before the record has been printed, to print and present to the court such parts of the record as it is necessary for the court to consider in passing on the motion, has been laid down in numerous cases.

And in *Crane I. Co.* v. *Hoagland*, 108 U. S., 5, this court applied the rule to a motion to dismiss or affirm, and denied the motion on the ground that it had not been complied with.

And in *Powers* v. *Baker*, 112 U. S., 710, the same ruling was made as to a motion to vacate a *supersedeas*, and was stated to be applicable to all motions of that kind, and the motion was denied for non-compliance with the rule.

In fact, the case before the court forcibly illustrates the reason for the rule and the necessity of its enforcement.

On examination of the briefs of counsel for the defendants in error, it will be seen that they have found it necessary to the presentation of their motions to refer the court to the following pages of the record: 2 to 57, 73, 80, 156, 190, 329, 331, 654, 677 and 682. It thus appears that a proper consideration of the motions on the briefs for defendant in error alone, and without reference

to any counter-statements for plaintiff in error, will involve an examination of different parts of the entire record.

We submit, therefore, that the motions should be denied for non-compliance with this well-settled rule, as was done in the cases of *Crane I. Co.* v. *Hoagland*, *supra*, and *Powers* v. *Baker*, *supra*.

If, however, it is the view of the court that the motions should not be denied on this ground, we contend that enough appears from the facts, as stated in the briefs of counsel, and without referring to the record, to show conclusively that the motions should also be denied on the merits.

In this connection, we call the attention of the court to the stipulation, printed at the beginning of the brief for the Lake Street Company, and to the fact that by reason of this stipulation it is important to the rights of others, as well as plaintiff in error, and to avoid possible question and complications in the future, that the motions made should be now disposed of, and not continued until the final hearing.

It appears that at the time the *supersedeas* was allowed, this stipulation was made at the suggestion of Mr. Justice Brown, in granting the writ of error and *supersedeas*.

The stipulation provided that no action should be taken in the foreclosure suit, brought by the plaintiff in error and still pending in the Circuit Court of the United States for the Northern District of Illinois, until a motion to discharge the writ of error and *supersedeas* (which it was stipulated should be made the first day of the October term) was decided.

By a subsequent stipulation, filed herewith, the time for making the motions referred to was extended to October 24th, or the next motion day thereafter, with the further provision that the motion should then be submitted without further notice on briefs and without oral argument.

It will be seen that the effect of this stipulation was to stay all further steps in the foreclosure suit until the motion to vacate the *supersedeas*, which counsel have united with their motion to dismiss, is decided. It is evident from the express terms of the stipulation that an early decision of the motion to discharge the *supersedeas* was intended, as otherwise it would result in the suspension of all action in the foreclosure suit for an indefinite time.

As a matter of fact, the foreclosure suit referred to, in its very nature, only involves the rights of the bondholders, the interest on whose bonds is admittedly in default. It clearly has no such relation to the issue in this suit that it should be postponed pending the ultimate decision of the case in this court. This is apparent from the fact that, as the foreclosure suit was only brought and could only be brought to enforce the rights of bondholders, it cannot be defeated by a decree of the state court removing the trustee, rendered while it was pending, even if that decree should be finally affirmed and carried into effect.

In that event, the bondholders, whose rights alone are involved in the foreclosure suit, would have a right to intervene and prosecute the pending suit of which the court had acquired jurisdiction, either in the name of the removed trustee or as substituted parties. So long, however, as the trustee continues

to act, the suit should properly be prosecuted by it, and it is a question whether the bondholders can properly intervene without its consent, which it is doubtful whether it can give without violating its stipulation, and obviously no harm can come from such prosecution, as the real question in the case would be as to the rights of the bondholders. If they have no rights growing out of the admitted defaults in the interest, the court will so hold, and no harm will come from the further prosecution of the suit. If, on the other hand, they have such rights, there is no just reason why the suit brought for their enforcement should be delayed, pending a contest over the question of the removal of the particular trustee.

II.

THE MOTION TO DISMISS AND DISCHARGE THE SUPERSEDEAS SHOULD ALSO BE DENIED ON THE MERITS.

The motion to dismiss the writ of error for want of jurisdiction is not argued, and no ground or reason is presented in support of it, in either of the briefs submitted for defendants in error.

On examination of both of these briefs, it will be seen that every proposition stated is directed to the single question *whether the state court decided rightly that it had jurisdiction.* (See brief for the Lake Street Company, pages 17-26, where the points of counsel are stated, and the argument following in support of them, pages 27-58.)

In the additional brief, filed for the American Trust and Savings Bank, counsel say:

"It is obvious the only question presented for deter-

mination by this court is *that of the jurisdiction of the state Superior Court.*" "Its (their client's) belief in *the soundness of the position of the state court on the jurisdictional questions involved* leads this defendant in error to present the following suggestions." (Brief, p. 4.)

(See, also, their propositions at pages 5-9 of their brief, all of which are limited to the question of the jurisdiction of the state court.)

Every proposition stated in each of the briefs for defendants in error involves the consideration and determination by this court of the very questions decided by the state court, and, therefore, assumes that this court has *jurisdiction* to decide them, and thus review the decision of the state court.

The entire discussion in the 100 printed pages of the two briefs can only have reference to the motion to affirm, and the ground assigned in support of it—that "it is apparent that the questions left in the record for determination in this court are frivolous, and that the appeal is taken for delay."

That this court has *jurisdiction* of the case, and, that the motion to dismiss and discharge the supersedeas for want of jurisdiction should, therefore, be denied, is clear beyond possible question from the undisputed facts, as stated in the briefs of counsel.

The following facts appear from the statements in the briefs of counsel for defendants in error:

1. The bill was brought by the Lake Street Company, a citizen of Illinois, against the Farmers' Loan and Trust Company, a citizen of New York. The Northern Trust Company and the American Trust and Savings Bank, citizens of Illinois, are also named as defendants, but no allegations are made in the bill against either of them.

The only controversy presented by the allegations of the bill is as to the right of the complainant, a citizen of Illinois, to an injunction against the bringing or prosecution of a foreclosure bill by the Farmers' Loan and Trust Company, a citizen of New York (which the bill prays may be made perpetual), and a decree for the removal of the Farmers' Loan and Trust Company, as trustee under the mortgage. The only allegations of the bill on which any claim to relief is based are the allegations which set forth the two alleged grounds on which the injunction and decree for removal against the Farmers' Loan and Trust Company are prayed for. These are:

(1) Its alleged action in filing a bill for foreclosure of the mortgage on account of the admitted defaults in the payment of interest, against the asserted objection of the majority of the bondholders, whose interest was being promptly paid through the device of debentures secured by their bonds, and

(2) The alleged failure of the Farmers' Loan and Trust Company to comply with the law of Illinois requiring trust companies doing business in Illinois, before accepting any trust, to make a deposit with the state auditor.

The only other relief which it is claimed is sought by the bill is the *consequential* relief of the appointment of a *new* trustee in case of and *after* the removal of the Farmers' Loan and Trust Company, a matter in which that company would manifestly have no interest or concern.

2. The bill was filed January 30, 1896, and, on the day following, the Farmers' Loan and Trust Company, appearing specially for the purpose, filed a petition for the removal of the cause to the United States court un-

der the removal act. It also filed with its petition a bond, conditioned as required by the removal statute, and signed by two persons, whose sufficiency has never been questioned, but in which the petitioner was not named as an obligor, and which was not signed by it. (Br. for Lake St. Co., pp. 10-11.)

It appears from the statements in the briefs of counsel that the petition for removal presented the following questions, the determination of all of which adversely to the petitioner was necessary to a denial of the removal prayed for.

(1) Whether, in the view that the case only involved a single controversy, the complainant and the defendant, the Farmers' Loan and Trust Company being admittedly citizens of different states, the Northern Trust Company and the American Trust and Savings Bank were *necessary* parties to the controversy, and if they were, whether they should be *ranged on the same side* of the controversy with the Farmers' Loan and Trust Company.

(2) Whether, in any view, there were not in fact different, separable controversies, which could be wholly determined, as between the Lake Street Company and the Farmers' Loan and Trust Company, without the presence of the other defendants.

(3) Whether that the allegations of the bill as to the action of the Farmers' Loan and Trust Company in proceeding for foreclosure under the mortgage, and the prayer for a decree against the bringing or *prosecution* of the suit for foreclosure it had already brought in the United States court, and the proof of the pendency of which was necessary to the maintenance of its bill and the relief prayed, did not present a Federal question, entitling

the Farmers' Loan and Trust Company to a removal of the case.

The presentation and discussion of these questions, for the purpose of showing that the state court correctly decided them adversely to the Farmers' Loan and Trust Company, covers over 58 printed pages of the briefs of counsel. (See Brief for the Lake Street Company, pp. 27–46; 52–56; Brief for Am. T. & S. B., pp. 9–46).

In addition to these questions, there were other questions, involved in the claim of the Farmers' Loan and Trust Company that the case should be removed, such as the sufficiency of the bond, etc., the presentation of which by counsel covers over 30 printed pages, making over 88 printed pages in all, which counsel have devoted to establishing *that the state court decided rightly in retaining jurisdiction of this cause.*

3. The state court denied the removal prayed for by the petition, and entered an order to that effect, and in so doing denied the right of removal claimed under the act of Congress.

4. After the presentation of the petition and bond to the state court, the petitioner, the Farmers' Loan and Trust Company, procured a transcript of the record and presented it to the United States court, and thereupon an order was entered by that court, docketing the cause.

The case having been docketed in the United States court, the Lake Street Company, and also the Northern Trust Company and the American Trust and Savings Bank, each appeared in that court and made motions to remand the case to the state court. The United States court, on full consideration of these motions, held in an extended opinion that the petition and bond were sufficient to give

the Federal court jurisdiction, (*Lake St. El. R. R. Co.* v. *Farmers' Loan & T. Co.*, 72 Fed. Rep., 804), and entered an order accordingly, overruling the motions to remand. An order was also made by the United States Court, dissolving the *ex-parte* injunction which had been issued in the state court, and from this order an appeal was taken by the Lake Street Company to the United States Court of Appeals, and that court overruled the appeal, but without passing upon the question of jurisdiction. (*Lake Street El. R. R. Co.* v. *F. L. & T. Co.* 77 Fed., Rep., 769.)

5. After the overruling of the motions to remand by the United States court, the Lake Street Company returned to the state court, and proceeded with the prosecution of its case there. The Farmers' Loan and Trust Company having filed an answer, setting up, among other things, the action of the complainant in moving to remand, and the order of the Federal court denying the motion, the case was set for immediate hearing. The order denying the motions to remand was entered on March 16th, and, on May 5th following, the cause was brought on for final hearing in the state court, and on June 4th a decree was entered by that court, removing the Trust Company as trustee, and enjoining it perpetually from bringing or *prosecuting* any suit to foreclose the mortgage.

6. On appeal from this decree, the Illinois Appellate Court affirmed the decree in an opinion in which it expressly considered and passed upon the question of removal to the United States court. (*F. L. & T. Co.* v. *Lake St. El. R. R. Co.*, 68 Ill. App., 666.) And, on appeal from this judgment, the State Supreme Court affirmed the judgment and decree in an opinion in which it also expressly considered and passed upon the question of re-

moval to the Federal court. (*F. L. & T. Co.* v. *Lake St. El. R. R. Co.*, 173 Ill., 439.)

7. The State Supreme Court, from whose judgment this writ of error was taken, based its decision denying the right to removal, claimed under the act of Congress, on the single ground that the bond filed was not in accordance with the act of Congress, as construed by that court, by reason of the fact that it was not *signed* by the petitioner. (See 173 Ill., at pp. 449-450.) The State Appellate Court also based its decision denying the right of removal on the same ground. (See 68 Ill. App., at pp. 669-670.)

Under that section of the Revised Statutes (Sec. 709), which gives this court jurisdiction to review the final judgments or decrees of the highest court of the state in the particular cases provided, it has been so many times decided that a writ of error will lie from this court to review the judgment of the highest court of a state, denying the right of a party to remove a case to the United States courts under the removal statutes, as to be elementary.

See the following direct decisions:

Kanouse v. *Martin*, 14 How., 23.

R. R. Co. v. *Koontz*, 104 U. S., 5, at p. 15.

R. R. Co. v. *Mississippi*, 102 U. S., 135, at p. 141.

Ry. Co. v. *Dunn*, 122 U. S., 513, at p. 516.

Ry. Co. v. *Fitzgerald*, 160 U. S., 556, at p. 582.

Removal Cases, 100 U. S., 457, at p. 472.

In the first of these cases, *Kanouse* v. *Martin*, 14 How., 23, *supra*, the plaintiff in error claimed in the state court the right to remove the case to the United States Circuit Court. The state court denied the removal, and gave judgment against the plaintiff in error, and this judgment was affirmed by the highest court of the state. On motion to dismiss a writ of error from this court, Chief Justice TANEY, delivering the opinion of the court, said:

"The plaintiff in error claimed the right to remove this case from the state court to the Circuit Court of the United States under the twelfth section of the Judiciary Act of 1789. The right claimed was denied by the state court, which retained the case and proceeded to give a final judgment against him. It is, therefore, precisely one of the cases enumerated in the twenty-fifth section of the act of 1789, in which jurisdiction is conferred upon this court, and in which the judgment of the state court may be reviewed upon writ of error, for the construction of an act of Congress was drawn in question, and the decision of the court was against the right claimed under it by the plaintiff in error."

This court has also many times held that, on a motion to dismiss for want of jurisdiction, the question is, whether the conditions exist which give this court jurisdiction under the act of Congress *to review the judgment* of the State Supreme Court, *and not whether the state court decided rightly*.

Kanouse v. *Martin*, 14 How., 23.
Cohens v. *Virginia*, 6 Wheat. 264, at pp. 423, 424.
Furman v. *Nichol*, 8 Wall., 44.
Murdock v. *Memphis*, 20 Wall., 590.

In *Kanouse* v. *Martin*, 14 How., 23, quoted above, the court (Chief Justice TANEY delivering the opinion), in overruling a motion to dismiss, on the ground that the

court had jurisdiction to review the decision of the State Supreme Court, denying the right of removal under the act of Congress, say:

"As to the authority of the Superior Court of the City of New York to retain the case, and the validity or invalidity of its proceedings and judgments after the motion to remove; *that question, according to the practice of the court, will stand for hearing when the case is reached in the regular call of the docket, but the motion to dismiss for want of jurisdiction in this court is overruled.*"

There are also other Federal questions involved and mentioned in the assignment of errors, as appears from the briefs of counsel for defendants in error, such, for instance, as the right of a state court to enjoin the further prosecution of a foreclosure case, commenced in the Federal court prior to the institution of the injunction case in a state court. That question was properly raised by answer in the *nisi prius* court, and that court sustained the right to stop by perpetual injunction the proceedings in the Federal court.

There is also the further question, raised by the answer and proofs on the hearing, whether, after the action of defendants in error in going into the Federal court and submitting the question of jurisdiction to that court by the motions to remand, and the direct adjudication of that court, overruling the motions, that it had jurisdiction of the case, and denying the motion to remand, the state court could properly proceed further in the case.

That it could not, and that the decision of the Federal court on the motions was an adjudication of the Federal question of the removability of the case, binding on the state court, we contend follows from the previous adjudications of this court, and was expressly held in cases

which presented the direct question, by the Supreme Court of Iowa and the Supreme Court of Wisconsin.

Under the well-settled rule of the decisions of this court cited, *supra*, and the undisputed facts, it is clear beyond possible question that this court has jurisdiction of the case, and we do not, therefore, blame counsel for defendants in error for at once and promptly abandoning the motion to dismiss for want of jurisdiction, and saying nothing in support of it.

The second motion made by defendants in error is to vacate the *supersedeas*. No ground is assigned for this motion in anything submitted by defendants in error, except as it is stated to be on the same ground as the motion to dismiss—that this court has no jurisdiction of the case. Probably counsel had some idea that it depended upon, and would go with, a motion to dismiss the writ of error for want of jurisdiction. It may be that they considered that, if there was no jurisdiction to entertain the writ of error, it was improper to order a *supersedeas*.

Even in that case, however, such a motion would be unnecessary, for if the writ were dismissed for want of jurisdiction, of course the *supersedeas* would fail, and what we have already said as to the motion to dismiss should, therefore, dispose of the motion to discharge the *supersedeas*.

We will add, however, that the appeal from the State Superior Court to the State Appellate Court operated as a *supersedeas*, and the same is true as to the appeal to the State Supreme Court. The record in this case was so voluminous that it was impossible to prepare it within the ten days in which the *supersedeas* is a matter of right, and the record was presented to a justice of this court a few days thereafter, and a *supersedeas* allowed.

In any view, no ground for discharging the *supersedeas* has been suggested by either counsel, except the single one of want of jurisdiction to issue the writ. This we have shown cannot be sustained.

In fact, it is not contended that any action can be taken under the decree which the *supersedeas* interferes with, except that counsel for the American Trust and Savings Bank argue that, by the decree, the American Trust and Savings Bank is directed to appoint a new trustee, and that it cannot do this if the *supersedeas* is retained. But, manifestly, no advantage would be gained by appointing a new trustee until the removal of the old trustee is established by a final decree. Unless it is the purpose to put the new trustee in office in place of plaintiff in error by this appointment, no possible advantage would be gained. But to withdraw the *supersedeas* for the very purpose of permitting defendants in error to appoint a new trustee, in order to oust plaintiff in error, in fact would be to give to the defendants in error the very right in controversy, viz: the removal of the plaintiff in error in advance of the decision of this court.

The very office of a *supersedeas* is to maintain the *status quo*, and we do not understand that there is any practice which authorizes its discharge for the very purpose of enabling the defendants in error to do the precise thing, its right to do which is the very matter in controversy.

Again, it appears from the record that the defendant in error, the Lake Street Company, is in default in the interest due on the mortgage bonds. Under the express terms of the mortgage, so long as this default continues the trustees can exercise none of the powers—except the single one of filing a bill to foreclose the mortgage—the precise thing which has been done by plaintiff in error.

It is not claimed that the appointment of the new trustee is in any way necessary to the efficient protection of the bondholders in the foreclosure suit. On the contrary, the manifest effort of both of the defendants in error is to obstruct and delay in every way possible the assertion of the right of the bondholders, not assenting to the scaling arrangement, to their interest, and their remedy by the foreclosure bill for its enforcement.

III.

THE MOTION TO AFFIRM SHOULD BE DENIED ON THE MERITS.

Counsel have united with their motion to dismiss a motion to affirm under the rule authorizing such a motion.

The rule of court, under which the motion is made, provides that a motion to affirm may be joined with a motion to dismiss. It was not, however, the intention of this rule to give a party a right to simply make a written motion to dismiss, and, adducing no reason or authority in support of it, immediately abandon it and hang upon it a motion to affirm.

It is settled by a long line of decisions of this court that if there is no color for the motion to dismiss, that is, if this court clearly has jurisdiction of the writ of error, the court will deny the motion to affirm, without inquiring into the merits of the case. Otherwise, it would be in the power of a defendant in error in every case, by making a motion to dismiss and uniting with it a motion to affirm, to obtain a hearing and decision of this court on the case in advance of its being reached on the docket, and thus in effect advance the case by a motion to dismiss or affirm.

That if there is no color for the motion to dismiss, the court will deny the motion to affirm without inquiring into the merits of the case, has been many times decided by this court.

The rule was applied and the motion to affirm thereupon denied, where there was no color for the motion to dismiss, in the following, among other cases:

School District v. *Hall*, 106 U. S., 428.
Davies v. *Corbin*, 113 U. S., 687.
New Orleans v. *L. C. Co.*, 129 U. S., 45.

See, to same effect,

Whitney v. *Cook*, 99 U. S. 607.

In *School District* v. *Hall*, 106 U. S., 428, *supra*, the court said:

"There is not in this case such a color of right to a dismissal as to make it proper for us to consider the motion to affirm."

In *Davies* v. *Corbin*, 113 U. S., 687, *supra*, the court expressly held that, unless there is some color to a right to dismissal, the court would not entertain a motion to affirm, saying, after referring to *Whitney* v. *Cook*, 99 U. S., 607:

"This practice has been steadily adhered to ever since, and in our opinion prevents our entertaining the motion to affirm in this case."

In *New Orleans* v. *Construction Co.*, 129 U. S., 45, *supra*, the court said:

"The motion to dismiss is therefore denied, and, as we do not think there was color for it, the motion to affirm must be denied also."

In *Whitney* v. *Cook*, 99 U. S., 607, *supra*, the court said:

"This is a motion to affirm only. Our amended rule

does allow a motion to affirm to be united with a motion to dismiss. This implies that there shall appear on the record at least some color of right to a dismissal. That is not pretended in this case. We are, therefore, compelled to deny the motion."

That in the case before the court there was color for the motion to dismiss, is nowhere argued by counsel. Counsel do say that the claim that the case was removed is "frivolous." Just what counsel mean by this, in view of the fact that they devote 100 pages to the discussion of the question of the removability of the case, is not clear, but we will assume that it means in effect that there was color for their motion to dismiss.

That there was no color for the motion to dismiss is clear beyond question.

1. The very fact that in both of the briefs filed in support of the motion, not a single line is devoted to the only ground on which the motion is based, viz: that this court has no jurisdiction, shows this. There is no pretense even of an argument in either of these briefs that this court has not jurisdiction. The entire 100 pages of the two briefs, which set forth the grounds relied on in support of the motion, are devoted to the discussion of the question whether *the state court decided rightly in denying the removal and retaining jurisdiction.* This discussion is manifestly wholly aside from the question of this court's jurisdiction, and can only have reference to the motion to affirm.

2. The very fact that counsel deem it necessary to devote 100 printed pages to the discussion of the question whether the case was removed for the purpose of satisfying this court that the State Court decided rightly that it was not, should be conclusive of the claim made that

the claim of jurisdiction in this court to review the judgment of the State Court is "frivolous."

3. The single fact that the judge of the United States Court, on full argument, denied a motion to remand the case, in a full written opinion, is in itself conclusive evidence that the claim of right to the removal is not "frivolous," and that there was no color for the motion to dismiss.

4. The very fact that the Supreme Court of the state expressly considered and passed upon the question of the right of removal is further conclusive evidence that the claim of right to a removal under the act of Congress is not "frivolous," and that there was no color for the motion to dismiss.

5. The further fact that the Supreme Court of the state places its decision on the narrow and technical ground that the bond was in form insufficient according to its construction of the Federal statute, contrary to the construction placed on the act by repeated Federal decisions and all the text writers on Federal practice, is further demonstration of the *bona fides* of the claim of right of removal.

And this argument is further confirmed by the fact that the Illinois Appellate Court bases its decision solely on the same narrow and technical ground.

6. We submit that no ground or reason has been presented by counsel for the consideration of the merits of this case on a motion to affirm, which would not apply equally to every case in which a removal is denied by the state court, and that the effect of the contentions of counsel would be that, in every case in which the act of Congress gives this court jurisdiction to review

a decision of the State Supreme Court, denying a removal, the defendant in error can in effect advance the case to a hearing upon the very question to be reviewed by making a motion to dismiss and uniting with it a motion to affirm.

It is argued by counsel that, even if this court should decide that the case was properly removed, and must therefore proceed in the United States court, that court will have no course open to it but to follow the decision of the State Supreme Court on the question of the removal of the trustee, and that, therefore, plaintiff in error can expect nothing, even from a reversal, except delay, and that it follows that this writ of error is prosecuted only for delay.

The argument is, in effect, that the question of the removal of plaintiff in error as trustee depends solely on the construction to be given to the state statute, providing for a deposit by trust companies, doing business in the state, before accepting any trust, etc., and that the State Supreme Court, having given a construction to this statute in the opinion filed in this case, which requires the deposit, the United States court will of necessity follow that decision, and, therefore, remove the plaintiff in error. (Brief for Lake Street Company, 26, 27.)

There are several answers to this argument.

1. The precise question of the construction to be given to this statute was expressly passed upon by Judge JENKINS of the United States Circuit Court, in a case decided long before the filing of the present bill. (*Farmers' Loan & Trust Co.* v. *C. & N. P. R. R. Co.*, 68 Fed. Rep., 412.) And in that decision, the precise construction of the statute contended for by plaintiff in error was adopted, Judge JENKINS holding that a mort-

gage of the character of the one in question was not a trust within the meaning of the statute, and that, therefore, the trustee was not required to make the deposit before accepting and acting under it. The contention of counsel is, in effect, that the State Supreme Court, by assuming a jurisdiction, which his contention assumes it did not have, has in effect forestalled the decision of the United States court in a case of which it alone had jurisdiction, and precluded it even from following its own previous decision to the contrary.

It is a novel proposition that the very decision of the State Supreme Court, which the proposition assumes is *coram non judice*, is in effect a decision of the case, binding upon the Federal court which alone had jurisdiction to hear and determine it, precluding it even from following its own previous decision.

2. But in fact, this alleged ground for the removal of the plaintiff in error has been taken away by a subsequent express statute, amendatory of the previous law, passed by the legislature of the State of Illinois in 1897, and after the rendition of the decree in the state court, a copy of which amendatory act is appended to this brief

By this amendatory act, the section of the original act, which required the deposit to be made, is amended by substituting a new amended section in its place. In other words, the particular section, as it was at the time of the decision and decree of the trial court, is repealed and a new amended section is substituted for it.

This new amended section, after making changes as to the amount of the deposit and other requirements, concludes with this language, *not in the original section*, viz: "*This act shall not apply to taking or accepting mortgages or trust deeds to secure bonds or money loaned.*"

There can be no question that a trust deed to secure bonds, like the trust deed of the Lake Street Company to plaintiff in error and its co-trustee, now before this court, is "a mortgage *or trust deed* to secure bonds or money loaned," and is, therefore, excluded from the operation of the act.

It will thus be seen that, by this amendment, it is expressly provided that the statute, on which the trial court based its decision that it was necessary for plaintiff in error to make the deposit required, *merely to qualify it to act in the future* (as the court held), shall not apply to mortgages or trust deeds like that in question—"mortgages or *trust deeds* to secure bonds or money loaned."

It thus appears that, whatever may have been the proper construction of the act, as it stood at the time of the hearing in the trial court, by an express provision of the act as it now stands, no such deposit is now required of plaintiff in error to qualify it to act as trustee in the future, and that if, at the time of hearing in the trial court, the law had been as it now is, the trial judge would not have entered the decree he did.

It is to be noted in this connection that it was not contended for defendants in error, and the trial court did not hold, that the alleged failure to make the deposit in any way invalidated the title conveyed to the plaintiff in error. On the contrary, it was expressly conceded that the mortgage was valid, and vested the title in plaintiff in error, subject to its terms and conditions. (See 68 Ill. App., at p. 681.)

The sole ground of the decision was, that until plaintiff in error complied with the statute, it was not qualified to act in the future, and that the complainant was entitled

to a trustee qualified to act, and for that reason the trial court by its decision gave plaintiff in error an opportunity to comply with the statute by making the deposit before decreeing its removal. (See Brief for Lake St. Co., p. 13.)

3. But the question stated by counsel as the sole question involved in determining the question as to the removal of plaintiff in error as trustee, is not the sole question.

Other questions were raised, the decision of any one of which in favor of plaintiff in error would be fatal to the relief asked by the bill.

One of these questions was, whether all the bondholders were not necessary parties to this bill, praying for the removal of the trustee, and this was one of the questions considered at length by the Illinois Supreme Court. Clearly this question, being one of general law, is one, on which the decision of the state court would have no binding force in the Federal court.

The State Supreme Court did not controvert, and the State Appellate Court expressly held, in accordance with the contention of plaintiff in error, that in a suit for the removal of a trustee, the *cestuis que trustent* are necessary parties, and that, without their presence as parties, the court should not proceed to a decree.

In its opinion in this case, the Illinois Appellate Court say (68 Ill. App., at p. 675):

"The general rule undoubtedly is that *all* the *cestui que trustent* are necessary parties to a bill to remove a trustee."

And such is beyond controversy the law.

The State Supreme Court, however, held that under

the doctrine of representation, the parties being numerous, the absent bondholders were in fact represented in the case by the *trustee sought to be removed*, the plaintiff in error, and its co-trustee, the American Trust and Savings Bank.

We wholly controvert this view, and if the case should proceed in the United States Court shall contend that it in effect nullifies the very rule which is uncontroverted, that the *cestuis que trustent* are necessary parties to a suit for the removal of the trustee, and is contrary to the principles and reasons of the rule of representation when applied to the undisputed facts.

It is also said in the opinion that the Northern Trust, the holder of the bonds consenting to the scaling arrangement, was a party and "represented a large majority of the bonds," viz., the bonds held by it.

The record shows that there are over 850 bonds not held by that company. The record also shows, and the bill expressly alleges, that the Northern Trust Company, receiving its interest by the device of debentures, was opposed to foreclosure, and desired the removal of plaintiff in error as trustee.

It is perfectly manifest that the bondholders, whose interests were in favor of foreclosure or who were opposed to the removal of plaintiff in error and none of whom were made parties, cannot be held to be represented in this suit by the Northern Trust Company, which opposed the foreclosure, and, on the express allegations of the bill, had put itself in the attitude of asking the removal of plaintiff in error as trustee.

4. Another question raised by plaintiff in error was whether, under the facts and general rules of law govern-

ing the subject, a bill would lie for the removal of a trustee for the alleged non-compliance with the statute.

The only ground of removal relied on was the alleged failure to make the deposit with the state auditor. It was not claimed that this in any way invalidated the title vested in plaintiff in error, or its powers as trustee, and the complainant, being admittedly in default in its mortgage interest, both at the time of the filing of the bill and the decree, there were, under the express terms of the mortgage, no powers which plaintiff in error could exercise, or duties it could perform, except to take such steps as the mortgage authorized to enforce payment of the defaulted interest. And the only efficient one of these powers—the filing of a foreclosure bill—plaintiff in error had already taken by filing the bill to foreclose.

The record shows that there had been an uninterrupted, continuous recognition by the Lake Street Company, by the co-trustee, the American Trust and Savings Bank, and by all the other parties, from the time of the execution of the mortgage down to the actual filing of the bill in this case, of plaintiff in error's right to act as trustee thereunder. It also shows that the claim that the plaintiff in error has no right to act as trustee was never at any time made by the Lake Street Company, until long after the admitted defaults in interest and the service of the different notices and demands by the bondholders to foreclose and the statement by the agent of this plaintiff in error that it intended to file a bill of foreclosure. There was no pretense either of any allegation or proof of any previous demand or request on it to make the deposit. The first suggestion in the record of any duty on the part of the plaintiff in error to make the deposit, or that it was in default in not making it, is found in the bill in this

case, filed after the filing of the bill of foreclosure by plaintiff in error. If the case proceeds in the United States court, we shall contend that, under these and other undisputed facts and the rules of law governing the subject of removal of trustees, no ground was shown for the removal of plaintiff in error as trustee.

5. Still another question was made, viz., whether the plaintiff in error was, in fact, doing business in Illinois, within the meaning of the statute. It was conceded, and the Supreme Court of Illinois held, that unless it was, it was not within the requirement. That court, however, held that, *upon the evidence adduced in the particular trial*, it was doing business; *non constat*, but that, *on another trial* in the Federal court, other evidence may be introduced which will show that plaintiff in error was not doing business.

6. Still another question raised, was whether, under any circumstances, the court should enter the decree it did, enjoining the further prosecution of the foreclosure suit previously brought and pending in the Federal court, and of which plaintiff in error contends the Federal court acquired jurisdiction prior to that of the state court.

We think we might properly close these suggestions at this point, but inasmuch as counsel for the Lake Street Company have presented a brief of 86 pages upon a motion to affirm because the appeal is frivolous, and this brief is supplemented by another brief of 66 pages for the defendant in error, the American Trust and Savings Bank, we will add some further suggestions.

As we have before said, the length of argument deemed necessary by counsel for defendants in error is in itself a refutation of the allegation of frivolity in taking

this writ of error. On the single question of removal, counsel themselves state that the state court held the case not removable, and that the United States Circuit Court for the Northern District of Illinois, after full argument, held the case removable.

Referring to the decision of the state trial court denying the removal, counsel for the Lake Street Company say:

"The state court *passed upon* the question as to the removability of the cause and retained jurisdiction thereof. * * * It (plaintiff in error) had a full hearing upon the question, and a judgment and finding was entered by the court upon that question." (Brief, 51–2.)

And both counsel argue that the decision of the United States Circuit Court, overruling the motions to remand, and the reasoning on which it was based, was erroneous.

On these facts alone, does not counsel's charge of frivolity fall? Do counsel charge that the United States Circuit Court referred to made a ridiculous or frivolous decision? Can it fairly be said that, when the state and United States Courts have taken opposite views of a question, a party is engaged in a frivolous appeal who seeks to have reviewed the judgment of either the one or the other court?

We can scarcely credit counsel with making this charge of frivolity in good faith. They would hardly accuse the United States Circuit Court of thus rendering a decision that should be fittingly characterized as frivolous.

Viewing the case in this light, we consider that counsel for defendants in error, by the motions and brief submitted, have by indirection sought to bring on this case for final hearing out of its regular order. For such

hearing, no record has been printed. We are not content to accept the statement of fact made by counsel. It is in many places erroneous and misleading. Even the assignments of error have not been printed to show what questions were raised.

The record is very voluminous, and it is difficult to approach even a short statement of the case without the printing required by the practice of the court.

We differ very materially from counsel for defendants in error in the statement made of the case. We do not deem it right or proper to here discuss the facts of the case, or the questions on account of which the appeal has been taken, at the length or in the way which would be proper in answering the 124 pages of printed matter which counsel have devoted to the subject, if the case was now before the court for argument and decision on the merits.

We deem it proper, however, to present a short statement of the case and of the questions involved, without discussion, for the purpose of further answering the charge (if further answer is necessary) that the claim by plaintiff in error that the case was removed is "frivolous" and that the "appeal is taken for delay."

The Lake Street Elevated Railroad Company made a mortgage trust deed to secure an issue of bonds not exceeding $10,000,000. The trustees named were the American Trust and Savings Bank and the Farmers' Loan and Trust Company. The evidence in the record shows, and it is stated in the briefs of counsel for defendants in error, that the Lake Street Company was unable to meet the interest on its bonds. It thereupon proposed a scheme of so-called "re-organization," whereby,

in effect, the first mortgage debt of the company was to be scaled to 60 per cent. of its face value, an additional 15 per cent. in unsecured non-cumulative income bonds being also given the bondholders.

The record also shows that, at the time the holders of the first mortgage bonds were asked to join in this so-called "re-organization," there was a floating indebtedness of nearly $1,000,000. The capital stock of the company actually issued and outstanding amounted to $10,000,000. By the proposed plan of so-called "re-organization," the holders of this $10,000,000 of stock were to retain the same control of the company which they had always had. They made no offer either to surrender any part of this $10,000,000 of stock for the purpose of issuing preferred stock to the first mortgage bondholders to the amount they were asked to scale their mortgage debt, or to advance any money whatever, either in the payment of the mortgage interest or of any part of the floating debt. By the proposed so-called "re-organization" the first mortgage indebtedness of this admittedly insolvent debtor was in effect scaled down 40 per cent. for the benefit of the stockholders in the company without any return from them whatever. In fact, by the device of a non-cumulative income bond, the stockholders were let into possible dividends in preference to accumulations in interest even on these bonds.

The record shows that the Lake Street Company, or its principal officers, had secured the ownership or control of a number of the bonds, and by enlisting the services of certain brokers and by holding certain meetings of the bondholders, a start was made towards such so called "re-organization," on the ground that the company was insolvent and could not pay its bonds or interest. By

various means, by defaulting in the interest due, by threats that no interest at all would be paid to the non-assenting bondholders (while the assenting bondholders were promptly paid theirs in the form of interest on debentures, secured by their bonds), by threats of prolonged litigation, a large majority of the bondholders were induced to accept the terms offered them. Some of the circulars leading up to this were issued and signed by the American Trust and Savings Bank, one of the trustees, and, as agent for the disbursement of the interest, it refused to pay interest on the bonds that would not come into the agreement, although they were presented at its banking house. The charge is made, and much evidence adduced in support thereof, that in this matter the American Trust and Savings Bank were acting in the interest of the debtor company and not of the bondholders.

It was required that bonds consenting to the scaling arrangement should be deposited with the Northern Trust Company as custodian, and a very large majority, covering all but about $1,000,000 of the bonds were so deposited with that company. There were $7,500,000 of bonds issued, and about $6,500,000 of them passed into the hands of the Northern Trust Company. The evidence shows that the American Trust and Savings Bank, the Lake Street Company and the Northern Trust Company were acting in harmony, not only in trying to complete the scaling arrangement, but in endeavoring to coerce bondholders to accept the proposition.

The non-assenting bondholders, holding about $1,000,000, including Ziegler, who owned $400,000 of the bonds and many other holders, both in New York and Chicago, were clamoring for the over-due interest, and asked both the trustees to bring a suit to enforce the se-

curity. And written demands to foreclose were served on the trustees. Following these demands, a bill was filed by the Lake Street Company in the state court to enjoin the holders of 605 of the bonds, joining in the formal demands, from enforcing the bonds, and an *ex parte* injunction was obtained. This suit was removed by the defendants to the United States Court, and a motion was then made to dissolve the injunction, which was pending at the time the present bill was filed.

The record shows repeated conferences between the two trustees and the Lake Street Company, as a result of which the American Trust and Saving Bank declared that it would not bring or join in bringing any suit to enforce the security. On the other hand, the Farmers' Loan and Trust Company came to the conclusion that such a state of facts was presented as required the submission of the matter to a court of equity, and that the proper way in which to submit that question was to file a bill for foreclosure.

At the time the foreclosure bill was filed, two installments of interest (and a third in part) were in arrears. The bill was so filed at about 10:30 A. M., on January 30, 1896. There were included as defendants to it the Lake Street Company, the Northern Trust Company, the American Trust and Savings Bank as a refusing trustee, and several other companies which had acquired rights to the mortgaged property by grants from the Lake Street Company, subsequent to the mortgage. On February 1st, several of these material parties, including the American Trust and Savings Bank, entered an appearance to the foreclosure bill. All the defendants appeared voluntarily, except the Lake Street Company, which was served on February 18th.

We contend that by the filing of the bill, which con-

tained a prayer for foreclosure, and a prayer, founded on a stipulation of the mortgage, that the court should take possession of the property by means of a receiver, the right of the United States court to proceed with the foreclosure suit in an orderly manner became perfected, and that jurisdiction was certainly made complete by the voluntary appearance of some of the most material defendants on February 1st.

The record shows that on January 30, 1896, within an hour after the foreclosure bill was filed in the Federal court, the suit now before the court was started in the state court, and an *ex parte* injunction obtained against the further prosecution of the foreclosure suit, already begun in the United States court. The complainant is the Lake Street Elevated Railroad Company, and the defendants are the two trustees and the Northern Trust Company. The prayer of the bill is to enjoin the bringing of any suit, or prosecuting the suit already brought to foreclose the mortgage and to remove the trustee.

The record also shows that there was no previous request on plaintiff in error to make the deposit required by the Illinois act of 1887, and that plaintiff in error had been continuously recognized as trustee by the Lake Street Company, the American Trust and Savings Bank, and by all other parties, by correspondence and other acts from the time of the execution of the mortgage down to the actual filing of the bill in this case.

Even in the view that the merits of the questions involved in reviewing the decision of the state court are before the court on this motion, there is but one of these questions which can be even discussed by reason of the failure to print the parts of the record necessary.

The single point on which the State Supreme Court based its decision that the case was not removed—that the bond was insufficient—admits of discussion, for the reason that the bond is printed in full in the brief for the Lake Street Company. (See pp. 10-11.)

The sole ground on which the Supreme Court of Illinois based its decision that the case was not removed, was that the bond for removal, signed by two persons, was not *signed* by the petitioner, and this, too, in face of the fact that it appeared by the record that, *before the hearing below*, the petitioner had in fact complied with the condition of the bond by filing the record in the Federal court, and that, therefore, the sole purpose of requiring the bond had been fulfilled.

And as further illustrating the narrowness of the ground on which the decision was based, we have the fact that, under the express decisions of this court, the giving of the bond is one of the requirements of the removal act which is held to be purely "modal and formal" and which may, therefore, be cured by amendment in the United States Circuit Court, and may *also be waived* by not raising the objection. (*Ayers* v. *Watson*, 113 U. S., 598.)

In addition to this, the state court had before it, the further fact that, after the docketing of the case in the United States court, a motion to remand had been made by the complainant in the case, and that an order had been entered overruling this motion.

Not only, therefore, had the sole purpose of requiring the bond been actually fulfilled, to the knowledge of the state court, but the precise question as to the bond had been in effect passed on by the Federal court on the mo-

tion *of the complainant* before the hearing of the case, and that court had decided that it acquired jurisdiction, notwithstanding the alleged objection to the bond.

Furthermore, even on the assumption that technically the law required the petitioner to *sign* the bond, when the Federal court had before it the fact that the case had been actually docketed, it could not have properly ruled otherwise on the motion to remand, both for the reason that the condition of the bond had been fulfilled, and the further reason that, the requirements being "modal and formal," it would be its duty to permit an amendment to the bond rather than remand the case.

Again, the record does not show that any objection was made in the state court to the sufficiency of the bond, and this being so, the Federal court had the right to refuse to remand for the alleged insufficiency of the bond on that ground also.

Ayers v. *Watson*, 113 U. S., 598, and cases cited.

It is a fair presumption that if, in the opinion of the State Supreme Court, there was any more substantial ground for denying the jurisdiction of the Federal court, notwithstanding the order of the Federal court overruling the motion to remand and the other facts before it, than the narrow one on which it decided that the case was not removed, etc., it would have based its decision on that ground.

And it would seem clear that, if it can be established that this, the sole ground of the decision of the state court, is erroneous, it would be a sufficient reason, in any view, for overruling the motion to affirm, leaving any other objections to the jurisdiction, not re-

ferred to in the opinion of the State Supreme court, to be presented and considered on the final argument.

The ruling of the State Supreme Court that the jurisdiction of the Federal court is defeated by the alleged defect in the bond rests on a narrow and technical construction of the removal act, and is contrary to repeated express decisions of different Federal courts, and the construction given to the act by every Federal decision on the subject and by every text writer on removal or Federal practice.

The removal act provides (Sec. 3) that the party petitioning for removal "*shall make and file*,"

"*A bond with good and sufficient surety*, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded, etc."

This section, it will be observed, does not require that the party petitioning for a removal shall *sign* the bond.

And as the only object of requiring the bond is to furnish indemnity to the party against whom a removal is sought, that object is fully accomplished by giving it the construction of which the language is clearly capable, viz: that as the petitioner presents the bond for the purpose of indemnifying the opposite party, then, if it constitutes sufficient indemnity, he "*makes and files*" the bond in law, although he has not signed it.

Such is the common-sense view of the provision in question, which was, in 1881, adopted by Mr. Justice BLATCHFORD in *Stevens* v. *Richardson*, 20 Blatchf., 53, and in 1883 by Judge DRUMMOND in *Public Grain and Stock Exchange* v. *W. U. Tel. Co.*, 11 Biss., 568.

And the construction given to the statute in these decisions by Mr. Justice BLATCHFORD and Judge DRUMMOND

has been regarded by all the text-writers as the proper construction.

And this construction is in accordance with the construction given by this court to the act of Congress (Rev. Stats., sec. 1000) providing for bonds on writs of error from this court.

See

Brochett v. *Brochett*, 2 How., 238.
Scruggs v. *R. R. Co.*, 131 U. S.; Appendix, cciv.

In *Stevens* v. *Richardson*, 20 Blatchf., 53, *supra*, (1881), in denying a motion to remand where the bond was not signed by the petitioner, Mr. Justice BLATCHFORD said:

"The plaintiff contends that, as section 3 of the act of 1875 says that the petitioner for removal is to 'make and file' the bond, the bond is void and the removal invalid. This objection is not tenable. The statute is satisfied, as to the bond, if a bond with sufficient surety is filed. The petitioner for removal *makes the bond, in the sense of the statute, if he offers it to the court as the bond required.* By section 639 of the revised statutes, he was required to offer good and sufficient security. The act of 1875 means no more."

In *Public Grain & Stock Exchange* v. *W. U. Tel. Co.*, 11 Biss., 568, *supra* (1883), on a motion to remand, it was contended that the case must be remanded, because the bond was not executed by the party seeking the removal.

In overruling this contention, Judge DRUMMOND said:

"The objection taken to the bond is, that it was not signed by the party. The language of the statute is, that the party seeking to remove shall '*make and file*' a bond. It is simply for indemnity to the party—as security that there shall be entered in the Circuit Court of the United

States, on the first day of its then next session, a copy of the record, and to pay all costs that may be awarded by the Circuit Court, if that court shall hold that the suit was wrongfully or improperly removed. No objection is taken to the sufficiency of the bond, or to the responsibility of the principal or the surety. *It will be observed that the statute does not declare that the party shall sign the bond, but only shall make the bond.* * * *

It seems to me that, where the bond is presented by the party who seeks the removal, although he may not have signed it, but it is signed by others, that it may be said he makes and files it, because he presents it for the purpose of indemnifying the opposite party, and, if it constitutes ample indemnity for that purpose, then he makes and files the bond in law, although he has not signed it. When a case is taken to the Supreme Court of the United States from the Circuit Court, on appeal or writ of error, it has never been supposed necessary that the party, although required to give the security, should sign the bond, but it has been considered sufficient provided a proper bond of indemnity is given by other persons. I think, therefore, that the objection taken to the bond is untenable."

It will be seen that by this express and well-considered decision by Judge DRUMMOND, then United States Circuit Judge, which has never been overruled, the construction of the statute, which was followed and acted upon in drawing the bond in this case, was established as the proper construction in the Circuit in which this petition and bond were presented.

The decisions to which we have referred, have been considered by all the text writers as settling the law on this subject

In Dillon on Removal of Causes (4th Ed.), sec. 74*a*, note (4), *supra*, Judge DILLON says:

"The bond is not required to be executed by the petitioner, himself, if it be executed by sufficient sureties," citing *Stevens* v. *Richardson*, 20 Blatchf., 53, *supra*.

In 2 Foster's Federal Practice, Sec. 385*b*, *supra*, the author says:

"The bond need not be executed by the petitioner if it have a principal and sufficient surety" citing *Stevens* v. *Richardson*, 9 F. R., 191, *supra*, and *Public Grain & Stock Exchange* v. *W. U. Tel. Co.*, 11 Bis., 568, *supra*.

In Desty on Removal (4th Ed.), sec. 106*a*, *supra*, it is said:

"The bond required for the removal of a suit from a state to a Federal court need not be signed by the applicant for removal if signed by others, named therein as principal and surety, or by sufficient sureties," citing *Public Grain & Stock Exchange* v. *W. U. Tel. Co.*, 16 Fed. Rep., 289, *supra*, and *Stevens* v. *Richardson*, 20 Blatchf., 53, *supra*.

The State Supreme Court's opinion, holding a different view from the foregoing authorities, is based solely on two previous decisions by the same court, both of which, it will be found on examination of the facts, were in fact *dicta*, and that court wholly ignored (making no reference to them) both the Federal decisions and the text writers sustaining the contrary construction.

On the merits of the case, we assert the following propositions, all of which are presented by our assignments of error:

1. That in the view that the case only involved a single controversy, the defendants in error, the American Trust and Savings Bank and the Northern Trust Company, were not indispensable or even necessary parties to the controversy, and, if they were, they should not be ranged on the same side of the controversy with the plaintiff in error, and for that reason the case was properly removed to the United States court.

2. That there were in fact two or more separable controversies, which could be fully determined as between the complainant, the Lake Street Company, and the defendant, the Farmers' Loan and Trust Company, plaintiff in error here, citizens of different states, without the presence of the other defendants, the American Trust and Savings Bank and the Northern Trust Company.

3. The bill was brought for the purpose of enjoining, by an injunction issued out of the state court, the further prosecution in a court of the United States of a suit previously brought in that court by the plaintiff in error, under the authority of the constitution and the laws of the United States, and therefore involved a Federal question, entitling the plaintiff in error to remove the case to the United States court.

4. The decision of the United States court on the motions to remand was an adjudication of the Federal question as to whether the cause was removed to the United States court, made on the motions of defendants in error submitting the question to that court for its decision, and the state court erred in proceeding further in the case after that adjudication had been brought before it by proper pleadings and proofs, and the action of the State Supreme Court in holding that the trial court thereafter properly proceeded in the case is reviewable in this court by writ of error.

5. The decree of the state trial court, perpetually enjoining the further prosecution of the foreclosure suit pending in the United States court, and of which that court had acquired jurisdiction before the filing of the bill in this case, was without jurisdiction, and in violation of the right of the plaintiff in error, under the constitution and laws of the United States, to bring and prosecute the

suit in the courts of the United States, and the action of the State Supreme Court, affirming the decree, is reviewable in this court by writ of error.

It will be seen that, if any one of these five propositions is established, it will entitle plaintiff in error to a reversal of the case, with the proper directions to the state court.

All of these propositions, the briefs of counsel for defendants in error assume to be involved in the record, and are controverted by them in different forms by extended arguments and the elaborate citation of authorities.

It is manifest that the discussion by us of these propositions would involve reference to, and the consideration of, different parts of the record (as their discussion by counsel for defendants in error has), including the assignments of error, the original bill, the petition for removal, the answers of the different parties, the record of the proceedings in the United States court, the final decree, etc., none of which have been printed. It would also involve the presentation of the different arguments, the citation of the authorities on which we rely to sustain them, as well as the discussion and analysis of the arguments advanced by defendants in error, and the great number of authorities, cited by them in the 124 pages of printed matter they have submitted, including the correction of their statements of the different parts of the record not printed. This it would be manifestly impossible for us to do on the motions as presented, for the reason that no part of the record has been printed, and that even such extracts as are made in the briefs of counsel are fragmentary, the principal parts of the record relied on being stated by counsel according to their construction of them and not quoted.

In view, also, of the character of the questions involved, and what we regard as the decisive reasons for our contention that the merits are not properly before the court on this motion, we regard it as wholly improper to submit to the court on these motions the full brief and argument we think necessary to properly present the propositions on which we rely on the merits of the case.

HERBERT B. TURNER,
WILLIAM BURRY,
JOHN J. HERRICK,
Solicitors for Plaintiff in Error.

APPENDIX.

"An Act to amend section six (6) of an act entitled 'An act to amend sections one (1), two (2), six (6) and sixteen (16) of an act entitled "An act to provide for and regulate the administration of trusts by trust companies," approved June 1, 1889. Appoved May 7, 1897. In force July 1, 1897.'

"Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly.* That section six (6) of an act entitled 'An act to amend section one (1) two (2), six (6) and sixteen (16) of an act entitled "An act to provide for and regulate the administration of trusts by trust companies,"' approved June 1, 1889, be and the same is hereby amended so as to read as follows:

134. CORPORATION TO DEPOSIT WITH AUDITOR.] Sec. 6. Each company in all cities and towns of 100,000 inhabitants, or more, before accepting any such appointment or deposit, shall deposit with the auditor of public accounts the sum of $200,000, and each company in all cities and towns of less than 100,000 inhabitants shall deposit with the auditor of public accounts the sum of $50,000, said deposits to be for the benefit of the creditors of said company, and to consist of bonds of the United States or municipal bonds of this state, or in mortgages on improved and productive real estate in this state, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon. Bonds and securites so deposited may be exchanged from time to time for other securities receivable as aforesaid. Said bonds of the United States or municipal bonds of this state to be registered in the name of said auditor officially, and all said securities to be subject to sale and transfer and to the disposal of the proceeds by said auditor only on the order of a court of competent jurisdiction, and as hereinafter provided in section 18. So long as the company so depositing shall continue solvent such company

shall be permitted to receive from said auditor the interest or dividends on said deposit.

PROVIDED, HOWEVER, that when it shall appear to the auditor of public accounts from the annual report of any such company that the value of the personal property and cash held and possessed by such company by virtue of the provisions of this act, and any amendment thereof, exceeds ten times the amount of the deposit aforesaid, he shall require said company, if in cities or towns of 100,000 inhabitants or more, to forthwith increase said deposit to the sum of $500,000 in such securities, and in all cities and towns of less than 100,000 inhabitants, to forthwith increase its said deposit to the sum of $125,000 in such securities. And whenever it shall appear to the auditor of public accounts that the amount of personal property and cash so held by any such company has been reduced below ten times the value of its original deposit above provided for, and said company is not in any default in its duties and obligations hereunder, he shall allow such company to reduce its said deposits to the sum originally required in this section by the withdrawal of such additional deposits until such time as an increase in its holdings shall again require an additional deposit as hereinbefore provided. *But this act shall not apply to taking or accepting mortgages or trust deeds to secure bonds or money loaned.*"